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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

KEITH TEON DOCKERY,

Petitioner - Appellant,

v.

FRANK S. THOMPSON,

Respondent - Appellee.

No. 02-36012

D.C. No. CV-00-01022-GMK

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted November 6, 2003
Portland, Oregon

Before: ALARCON, RAWLINSON, and BYBEE, Circuit Judges.

Oregon state prisoner Keith T. Dockery's appeal fails because a state prisoner is barred from presenting a claim in a federal habeas petition if he forfeited the

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claim by failing to abide by independent and adequate procedural rules in state court. *See Coleman v. Thompson*, 501 U.S. 722, 729-730 (1991).

Dockery appealed his sentence, first on direct review, then in state post-conviction proceedings, arguing that the trial court had failed to make the factual findings required by ORS § 137.123 before imposing consecutive sentences. The post-conviction court agreed that the trial court had failed to make the required findings and, based on this omission alone, remanded Dockery's case for resentencing. Post-conviction relief was otherwise denied.

At his resentencing hearing, Dockery argued for the first time that his two kidnapping convictions should merge under ORS § 161.067. The trial court initially stated that the merger issue was not before the court, but, when pressed by defense counsel, ruled that Dockery's convictions did not merge.

Dockery sought post-conviction relief a second time, again arguing that his convictions merged under Oregon law. The post-conviction court denied relief, holding that Dockery was "precluded from pursuing in this post-conviction proceeding his claim the trial court erred in failing to merge his convictions because he did not raise that issue in his first post-conviction case."

Because the second post-conviction court explicitly relied upon the state rule requiring that all grounds be raised in a prisoner's first post-conviction proceeding,

Dockery's due process claim is barred by an adequate and independent state procedural ground. *See Bowen v. Johnson*, 166 Or.App. 89, 92 (2000) (requiring a petitioner to state all grounds for post-conviction relief in the petition). We conclude that a valid factual basis supports the district court's finding that Dockery failed to assert his merger claim in his amended petition before the first post-conviction court.

Finally, Dockery has not presented any additional evidence to establish his actual innocence and therefore has not established a "miscarriage of justice." He merely argues legal innocence of his sentence, which cannot excuse his default. *Gandarela v. Johnson*, 286 F.3d 1080, 1085 (9th Cir. 2001).

AFFIRMED.